

## **Review of Pebble FEIS, Appendix B: Alternatives Development Process**

### **Draft Rantings from a Former EPA Wetlands Expert**

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#### **Summary**

The Corps of Engineers, Alaska District (hereinafter Corps) completely biases the analysis of alternatives in the FEIS, as it did in the DEIS, to the benefit of the applicant. Misstating and misinterpreting the regulations, as well as throwing in a bizarre public interest finding, the Corps dismisses all off-site alternatives that could potentially achieve the basic project purpose with far less environmental harm. In doing so, the Corps frees the applicant from its regulatory burden-of-proof to show why less-damaging alternatives are not practicable. Instead, the Corps directs its regulatory process to where the Corps can make a finding that the proposed Pebble Mine Project as the least environmentally damaging practicable alternative (LEDPA), when it is not. The Pebble Mine is potentially the most environmentally damaging mining proposal, if not any proposal of any kind, ever considered under the Clean Water Act.

#### **Background**

The regulations at 40CFR230.10(a) state that no discharge shall be permitted if there is a less environmentally damaging practicable alternative to achieve “the basic project purpose.”<sup>1</sup> The regulations then state that if the basic purpose is not “water dependent” (like a port or shipyard) AND the project would discharge fill material into a “special aquatic site” as defined in the regulations (wetlands, riffle and pool complexes, vegetated shallows, and mudflats are all special aquatic sites that would be filled by the Pebble Project), the regulations presume that a less damaging practicable alternative to achieve the basic project purpose is, in fact, available, unless the applicant clearly demonstrates that it is not.

This regulatory presumption exists because the regulations consider the losses of “special aquatic sites” to be among the most severe environmental impacts contemplated by the regulations. In other words, destroying wetlands and streams and vegetated shallows and mudflats is a big deal under the Clean Water Act, and should be avoided wherever and whenever it is practicable to do so.

#### **The Corps, Alaska District appears biased towards the Pebble Limited Partnership**

Instead of adopting the strong regulatory presumption against losses of special aquatic sites that the regulations intend, the Corps has adopted its own definition for the word “practicable” to give this particular applicant a free pass. The Corps begins by stating:

*“In terms of practicability, the 404(b)(1) guidelines provide a two-fold definition of a practicable alternative (40 Code of Federal Regulations [CFR] Part 230.10[a][2]):*

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<sup>1</sup> It is a minor point, but the Corps altered the basic project purpose to be “mining mineral ore” in the FEIS, having previously defined it as “mining” during the DEIS scoping. See: <https://www.pebbleprojecteis.com/files/02e12d01-4609-4bb9-bb78-ffc02e41ccb6> (How Alternatives will be Developed, page 2)

1. A practicable alternative is one that is available and capable of being done after taking into consideration cost, existing technology, and logistics.<sup>1</sup>
2. The three practicability criteria (cost, existing technology, and logistics) apply in light of the overall project purpose.

<sup>1</sup> The guidelines state that if an alternative is otherwise a practicable alternative, an area not presently owned by the applicant that could reasonably be obtained, used, expanded, or managed in order to fulfill **the overall purpose** of the proposed activity may be considered a practicable alternative. In other words, the fact that an applicant does not own an alternative parcel does not preclude that parcel from being considered as a practicable alternative.” (emphasis added)

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In fact, the regulations state: “If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the **basic purpose** of the proposed activity may be considered.”<sup>2</sup> (emphasis added)]

The regulations define the word “practicable” as meaning that an alternative must be available (to a typical applicant<sup>3</sup>) and capable of being done after consideration of costs, logistical and technical constraints “in light of overall project purposes.”<sup>4</sup> The intent is to reduce range of alternatives that the Corps should consider by eliminating those that are not available, would be too costly to a typical applicant, or that have serious logistical or technical constraints.

At most, the Corps should have used the “overall project purposes” to refine the basic project purpose of “mining” to that of copper mining, which is, in fact, the applicant’s overall purpose.<sup>5</sup>

It is clearly not the intent of 40 CFR 230.10(a)(2) to shoehorn an otherwise not-permittable project into a position of being the LEDPA by adding artificial constraints (cite Ninth Circuit case law), such as limiting off-site alternatives to a particular geographic region that is not even recognized by the industry being regulated, or by requiring all off-site alternatives to have the same secondary mineralization as the applicant’s preferred ore deposit. Furthermore, it would be contrary to the intent of the regulations to bypass consideration of acquiring, leasing, or utilizing an existing (or abandoned) mining operation by deciding unilaterally that the project purpose must include construction and operation of an entirely new mine.

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<sup>2</sup> See 40 CFR 230.10(a)(2).

<sup>3</sup> The preamble to the regulations (check this) and subsequent guidance (check this) make it clear that the financial standing of the applicant has no bearing on the determination of “practicable” insofar as costs are concerned. If it would be financially feasible for a “typical” applicant to acquire, manage, or utilize a less-damaging alternative, then that alternative is, in fact, practicable, whether or not a specific project applicant has the financial means or desire to pursue that less-damaging alternative.

<sup>4</sup> 40 CFR 230.10(a)(2) states: “(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the **basic purpose** of the proposed activity may be considered.” (emphasis added)

<sup>5</sup> On May 25, 2019, PLP made a presentation to the Alaska House Resources Committee, focusing on the importance of copper, and boldly stating as the first of its “Pebble Facts” that “Pebble is a copper mine.” See: [http://www.akleg.gov/basis/get\\_documents.asp?session=31&docid=23397](http://www.akleg.gov/basis/get_documents.asp?session=31&docid=23397)

But that is exactly what the Corps has done, to the benefit of the applicant.

It is noteworthy that the regulations do not use the singular term “overall project purpose” which is entirely of the Corps’ own creation and not the result of formal rulemaking like the language in the 404(b)(1) regulations. And, in giving itself unilateral discretion to define its own artificial term in ways that circumvent the 404(b)(1) alternatives analysis, the Corps makes the unprecedented leap from a basic purpose of “mining” to a specific set of secondary requirements that eliminate all but the applicant’s preferred project:<sup>6</sup>

1. The Corps requires that the project purpose include developing and operating a mine. This effectively eliminates consideration of any existing mines that the applicant could potentially have acquired, utilized, or managed under the regulations.
2. The Corps abandons the concept of a basic purpose of mining to the specific requirement that all alternatives have the same secondary mineralization as the Pebble Deposit. All alternatives that do not have recoverable quantities of gold and molybdenum are therefore rejected out of hand, even though they may actually be far less damaging practicable alternatives to achieve the project purpose of copper mining.
3. And finally, the Corps makes a truly bizarre determination that the basic purpose of mining, or even of copper, gold, and molybdenum mining, can only be achieved “practicably” in this case, within the State of Alaska, when that simply is untrue. The Corps claims that this is some sort of public interest determination on its part, reasoning that it would be good for Alaska to have this particular mine, and then makes it a requirement for every alternative. This determination flies in the face of the applicant’s own search for alternative copper porphyry deposits throughout the Americas, before it decided to acquire the rights to the Pebble Deposit from another mining company well over a decade ago. If the applicant did not constrain its own search to the State of Alaska, the Corps has no business limiting the consideration of alternatives to Alaska alone. The Corps is well-aware that the Canadian applicant’s parent corporation has other copper mining operations outside of Alaska, and the United States, and the mining industry itself would not likely accept such a narrowing of where it could consider alternatives for mining copper if the Corps were to impose the requirement.

### **Conclusion for now**

In forcing the project to be not only in Alaska, but at the Pebble Deposit, the Corps has artificially eliminated consideration of less damaging practicable alternatives in order to make a finding that the Pebble Project is the least damaging alternative for copper mining, when it is, in fact, likely the most damaging project ever considered.

### **Stuff to further flesh out**

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<sup>6</sup> The Corps states that it “*focused on PLP’s statement, exercising independent judgement in defining purpose and need for the project from both PLP’s and the public’s perspective. The USACE determined that the overall project purpose is to develop and operate a copper, gold, and molybdenum mine in Alaska to meet current and future demand.*” (emphasis added. See FEIS Appendix B, page B-7)

Page B-6:

*LOC-002: Whistler Project:*

*Screening— 1. Purpose and Need Test: Whistler does not contain molybdenum (Athey and Werdon 2017), and therefore does not meet the overall purpose and need. Why Eliminated—This option does not meet the overall project purpose because **Whistler does not contain molybdenum.***

Pages B-6 and B-7:

*LOC-003: Pyramid Deposit: It would be extremely expensive to conduct additional exploration to identify if measured and indicated resources exist at Pyramid (e.g., PLP has spent approximately \$700 million to date on exploration), and it is unknown at this time if such a program would identify adequate resources to plan mine development at Pyramid. Therefore, it is concluded that resources at Pyramid are not known and not available. Unavailable alternatives are not practicable.*

This is bogus. Just because PLP sunk a bunch of money into an alternative that may not be permissible, this alternative may be considered practicable if PLP had pursued it and delineated it. This is an Attleboro Mall type argument.

Pages B-7 and B-8:

*LOC-004 (Outside of Alaska)*

*To develop the EIS purpose and need statement pursuant to NEPA regulations (40 CFR Part 1502), the USACE focused on PLP's statement, exercising independent judgement in defining purpose and need for the project from both PLP's and the public's perspective. The USACE determined that the overall project purpose is to develop and operate a copper, gold, and molybdenum mine **in Alaska** to meet current and future demand. This option does not meet the overall project purpose of the project.*

Page B-8:

*LOC-005 (Massive Sulfide Deposits)*

*Screening— 1. Purpose and Need Test: These deposits do not contain molybdenum, and therefore do not meet the Purpose and Need. Why Eliminated—These deposits **do not contain molybdenum** and do not meet the overall project purpose.*

Page B-13:

*Smaller mine pit: 2. Reasonable and Practicable Test: This option has a lower throughput than TPD-002, which evaluated a 50,000-tpd option. An optimization study (PLP 2018-RFI 059)*

*showed that option TPD-002 would have a negative NPV, due to the fixed infrastructure component of the costs. LAY-005 would have a lower (greater negative) NPV than TPD-002. Alternatives that require private industry to operate without profit for any appreciable period of time cannot be judged reasonable or practicable (by standards established in the 404(b)(1) guidelines).*

Here, the Corps utilizes claims by the applicant that a smaller mine would not be practicable economically, yet the Corps has done nothing to show that the 20-year project is, in fact, economically feasible, including closure and long-term maintenance costs.

Pages B-13-B-14:

*Larger Mine: This option exceeds the scope of the project, and would increase overall adverse impacts. The USACE is required to evaluate the Applicant's project, as proposed in the Department of Army permit application. Future expansion of the mine has been determined reasonably foreseeable by the USACE, and an expansion scenario developed and analyzed as a cumulative effect in the EIS. The USACE cannot legally analyze mining the entire resource as the proposed, nor can they analyze the expansion scenario as an additional alternative.*

This even though the project sponsor touts that the mine may operate for 200 years.

Page B-21:

*Option PRO-004: Purpose and Need Test: This option would not meet the overall project purpose is to develop and operate a copper, gold, and molybdenum mine in Alaska in order to meet current and future demand.*

*Option PRO-005: 1. Purpose and Need Test: This option would not meet the overall project purpose to **build a mine**.*

This is total B.S.